LEFTENAN KOLONEL HAFIZ HJ SULAIMAN & ORS
v. ZULKEFLI MOHAMED

COURT OF APPEAL, PUTRAJAYA
VAZEER ALAM MYDIN MEERA JCA
MARIANA YAHYA JCA
WONG KIAN KHEONG JCA
[CIVIL APPEAL NO: C-01(A)-43-01-2022]
27 JULY 2023

Abstract – *The Criminal Procedure Code ('CPC') provides that all offences under the Penal Code ('PC') and any other law shall be inquired into and tried according to the CPC. However, in a charge concerning disobedience of the standing order in relation to the armed forces, and which does not involve a criminal offence under the PC, the Armed Forces Act 1972, or any other laws, the provisions of the CPC, including s. 399 of the CPC which deals with summary trials, is not applicable. Even though reg. 16 of the Armed Forces (Terms of Service of Regular Forces) Regulations 2013 uses the term 'summary trial', a summary trial conducted by a commanding officer is different from a summary trial conducted by a 'court'.*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Appeal against – Applicant sergeant and serviceman of armed forces – Methamphetamine found in urine sample analysed by chemist – Applicant requested for chemist to give evidence at summary trial – Chemist not called during summary trial – Applicant found guilty and sentenced to fine by commanding officer but chief of army discharged applicant from service on ground that his service was no longer required – Applicant sought certiorari order to set aside decisions of commanding officer and chief of army – Whether non-calling of chemist prejudiced applicant – Whether there was procedural impropriety – Whether applicant's constitutional right to livelihood adversely affected – Armed Forces Act 1972, s. 97(9) – Armed Forces (Terms of Service of Regular Forces) Regulations 2013, reg. 61(1)(m) – Criminal Procedure Code, s. 399(1)*

ADMINISTRATIVE LAW: *Judicial review – Mandamus – Appeal against – Applicant serviceman of armed forces – Methamphetamine found in urine sample analysed by chemist – Applicant requested for chemist to give evidence at summary trial – Chemist not called during summary trial – Applicant found guilty and sentenced to fine by commanding officer – Chief of army discharged applicant from service on ground that his service was no longer required – Whether order of mandamus ought to be granted to direct re-trial by court-martial – Armed Forces Act 1972, s. 97(9)*

The respondent was a sergeant and a 'serviceman' of the armed forces. The respondent's urine sample was analysed and found to contain 'methamphetamine', a substance prohibited by the 'Perintah Bahagian Pertama Batalion Kedua Belas, Regimen Askar Melayu DiRaja (Mekazine) Bil 21' ('standing order') ('chemist report'). The chemist report was served on the respondent and he then served a letter on the commanding officer ('first appellant'), requesting for the chemist to give evidence at the summary trial ('respondent's request'). During the summary trial, the chemist was not called to give expert evidence and to be cross-examined by the respondent. The first appellant found the respondent guilty of the charges and ordered him to a pay a fine equivalent to his wages for 14 days ('first appellant's decision'). The chief of army ('second appellant') however discharged the respondent from service on the ground that his service was no longer required ('second appellant's decision'). The respondent filed a judicial review application in the High Court, for the following reliefs: (i) a *certiorari* order to set aside the first and second appellant's decisions; and (ii) an order of *mandamus* to direct the respondent to re-try by court-martial. The application was allowed on the grounds that, *inter alia*, the non-calling of the chemist had resulted in irreparable prejudice to the respondent and procedural impropriety which invalidated the first and second appellants' decisions. Hence, the present appeal. The appellants submitted that: (i) as the first appellant had only imposed a fine on the respondent, s. 97(9) of the Armed Forces Act 1972 ('Act') did not require the first appellant to accord the respondent the right to elect to be tried by court-martial; (ii) the first appellant was not required to call the chemist to testify at the summary trial because: (a) the proviso to s. 399(1) of the Criminal Procedure Code ('CPC') had been fulfilled as the chemist report had been served on the respondent more than ten clear days before the commencement of the summary trial; (b) the chemist report had been tendered as evidence at the summary trial without any objection by the respondent; and (c) the respondent could have called the chemist to testify in support of his defence at the summary trial but he chose not to do so; and (iii) the second appellant's decision was lawfully made, pursuant to reg. 61(1)(m) of the Armed Forces (Terms of Service of Regular Forces) Regulations 2013 ('Regulations'). In any event, there was no nexus between the first appellant's decision and the second appellant's decision. Even if the first appellant's decision was quashed by a *certiorari* order, the second appellant was empowered under reg. 61(1)(m) of the Regulations to make the second appellant's decision.

Held (allowing appeal in part)
Per Wong Kian Kheong JCA delivering the judgment of the court:

(1) The first appellant had not breached s. 97(9) of the Act by not affording the respondent a right to elect to be tried by court-martial. This was because the first appellant had only imposed a fine on the respondent.

Section 97(9) of the Act did not require the first appellant to give the respondent a right to elect to be court-martialled. As such, there was no lawful basis for the High Court Judge ('HCJ') to issue a *mandamus* order for the respondent to be court-martialled. (paras 19 & 39)

(2) The first appellant's reliance on the proviso to s. 399(1) of the CPC to justify the refusal to call the chemist at the summary trial was misplaced as: (i) section 3 of the CPC had expressly provided that all 'offences under the Penal Code' ('PC') and 'offences under any other law' 'shall be inquired into and tried' according to the CPC, including s. 399 of the CPC. The charge in this case concerned disobedience to the relevant standing order and did not involve a criminal offence under the PC, the Act or any other law. Accordingly, all provisions in the CPC, including s. 399 of the CPC, could not apply in this case. Although reg. 16 of the Regulations used the description 'summary trial', a summary trial conducted by a commanding officer is different from a summary trial conducted by a 'court', which is defined in s. 2(1) of the CPC as the High Court, Sessions Court or Magistrates' Court; (ii) section 399(1) of the CPC has stated that a chemist report 'may be given in evidence in any inquiry, trial or other proceeding' under the CPC, not under the Act and the Regulations; and (iii) the proviso to s. 399(1) of the CPC only enabled the Public Prosecutor, not the commanding officer, to tender a chemist report in a criminal trial if the Public Prosecutor had served the chemist report on an accused person not less than ten clear days before the commencement of the criminal trial. As such, a commanding officer could not rely on the proviso to s. 399(1) of the CPC. (para 22)

(3) The High Court's decision, that the first appellant's decision had been made due to a procedural impropriety, was upheld, namely the respondent had been deprived of a reasonable opportunity of presenting his defence at the summary trial when the first appellant failed to call the chemist to give expert evidence and be cross-examined by the respondent at the summary trial. This decision was premised on the following evidence and reasons: (i) it could not be denied that the gravamen of the charge depended solely on the expert evidence of the chemist. In other words, the chemist's expert testimony was crucial to prove the charge against the respondent beyond all reasonable doubt; (ii) the respondent's request had been sent to the first appellant. There was no evidence that the chemist was not available to testify at the summary trial; (iii) before the commencement of the summary trial, the first appellant did not inform the respondent that the first appellant would not accede to the respondent's request. Hence, the respondent was not able to make any arrangement to call the chemist to give an expert opinion at the summary trial; and (iv) the summary trial had been

A postponed once. There was no reason why the summary trial could not be postponed a second time so as to enable the first appellant to call the chemist to give expert evidence at the summary trial. (para 28)

(4) The HCJ had exercised lawfully his discretion to issue a *certiorari* order to quash the first appellant's decision. The first appellant's procedural impropriety had caused an injustice to the respondent by adversely affecting his constitutional right to livelihood. Notwithstanding the quashing of the first appellant's decision by the High Court (due to the first appellant's procedural impropriety), the second appellant's decision could still be lawfully made under reg. 61(1)(m) of the Regulations. In other words, once the HCJ had set aside the first appellant's decision, the High Court could not set aside the second appellant's decision as a matter of course. By virtue of O. 53 r. 3(2) of the Rules of Court 2012 ('ROC'), the respondent was bound by the statement, which did not state any ground to invalidate the second appellant's decision let alone refer to reg. 61(1)(m) of the Regulations. Furthermore, the respondent did not apply pursuant to O. 53 r. 7(1) of the ROC, to amend the statement. Due to the application of reg. 61(1)(m) of the Regulations, the respondent had been lawfully discharged from service by the second appellant's decision. An order of *mandamus* to direct the respondent to be tried by court-martial was an exercise in futility. (paras 31, 35, 37 & 40)

Case(s) referred to:

DKLS Sunshine Sdn Bhd v. Kerajaan Negeri Pulau Pinang & Anor [2019] 3 CLJ 593 CA ***(refd)***

Hanson v. Church Commissioners for England, R v. London Rent Assessment Committee, ex p Hanson [1978] QB 823 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

Kolonel Dr Faiz Azraai Abdul Aziz v. Mahkamah Tentera Divisyen Keempat Infantri Malaysia [2023] 5 CLJ 843 FC ***(refd)***

Majlis Angkatan Tentera Malaysia v. Mohd Nurul Ami Mohd Basri [2019] 2 CLJ 772 CA ***(refd)***

Malayawata Steel Bhd v. Union Of Malayawata Steel Workers [1977] 1 LNS 69 HC ***(refd)***

Re Tufnell (1876) 3 Ch D 164 ***(refd)***

Wan Ramli Wan Seman v. Lt Kol Sharull Hesham Md Yasin & Ors [2023] 1 LNS 1086 HC ***(refd)***

Legislation referred to:

Armed Forces (Summary Jurisdiction) Regulations 1976, regs. 12, 14(1), 16

Armed Forces (Terms of Service of Regular Forces) Regulations 2013, reg. 61(1)(m)

Armed Forces Act 1972, ss. 2, 15, 36, 51, 95, 96(2), (4), (5), 97(2)(a), (b), (3)(a), (b), (c), (d), (e), (f), (g), (5), (6), (7), (8), (9), (11)

Criminal Procedure Code, ss. 3, 399(1)

Federal Constitution, arts. 5(1), 8(1), 160(2)

Interpretation Acts 1948 and 1967, s. 3(b)

Rules of Court 2012, O. 53 rr. 2(3), 3(2), 7(1)

Rules of the Court of Appeal 1994, r. 54

For the appellants - Noor Fadzila Ishak; SFC
For the respondent - Rejinder Singh & Mohammed Nasser Yusof; The Law Chambers Of Fauzi & Nasser

[Editor's note: Appeal from High Court, Kuantan; Judicial Review Application No: CA-25-2-02-2021 (overruled in part).]

Reported by Lina E

JUDGMENT

Wong Kian Kheong JCA:

Introduction

[1] This appeal concerns the following parties:

(i) the respondent (respondent) was a Sergeant of the Twelfth Battalion of the Royal Malay Regiment (RMR) stationed in Daralockwood Camp, Kuantan, Pahang Darul Makmur (camp) and a "serviceman" of the armed forces as defined in s. 2 of the Armed Forces Act 1972 (AFA);

(ii) the first appellant (first appellant) was the respondent's "commanding officer" (defined in s. 2 of the AFA) (commanding officer) at the camp;

(iii) the second appellant (second appellant) is the chief of army who is the "competent authority" (competent authority) appointed by the Armed Forces Council (third appellant) under s. 2 of the AFA; and

(iv) the Ministry of Defence and Government of Malaysia are the fourth and fifth appellants ("fourth appellant" and "fifth appellant") respectively.

In this judgment, we shall refer to the first to fifth appellants collectively as the "appellants".

[2] This appeal raises the following novel questions:

(i) when a serviceman (accused) is charged with disobedience to a "standing order" (standing order) made under s. 51 of the AFA (charge) and if the commanding officer decides to deal summarily with the charge (summary trial), during the conduct of the summary trial, when is the commanding officer required by s. 97(9) of the AFA to accord to the accused the right to elect to be tried by court-martial?

we use the description "summary trial" as provided in reg. 16 of the Armed Forces (Summary Jurisdiction) Regulations 1976 (AFSJR);

(ii) if the commanding officer conducts a summary trial:

(a) has the commanding officer committed a procedural impropriety by refusing to call the chemist (who has found the urine sample of the accused to contain a substance which is prohibited by a SO) to give expert evidence and be cross-examined by the accused at the summary trial?; and

(b) if the commanding officer has committed a procedural impropriety as described in the above sub-para. (a), whether such a procedural impropriety can be excused by any one of the following grounds:

(1) in accordance with the proviso to s. 399(1) of the Criminal Procedure Code (CPC), the chemist report has been previously served on the accused more than ten clear days before the commencement of the summary trial;

(2) the accused has not objected to the admissibility of the chemist report at the summary trial;

(3) the accused has not cross-examined all the witnesses called by the commanding officer at the summary trial; and

(4) the accused can call the chemist to testify for the accused at the summary trial;

(iii) if the commanding officer has committed a procedural impropriety with regard to the summary trial, whether the court can issue a *certiorari* order to quash:

(a) the finding of the commanding officer that the accused is guilty of the charge; and

(b) the punishment meted out by the commanding officer to the accused (commanding officer's decision); and

(iv) with regard to a decision of the competent authority made under reg. 61(1)(m) of the Armed Forces (Terms of Service of Regular Forces) Regulations 2013 (AFTSR) to discharge the accused from service in the armed forces (service) on the ground that the accused's service was no longer required (competent authority's decision):

(a) if the court has issued an order of *certiorari* to invalidate the commanding officer's decision, can the court also issue a *certiorari* order to quash the competent authority's decision as a corollary?; and

(b) in view of the literal meaning and purpose of reg. 61(1)(m) of the AFTSR, should the court decline to exercise its discretion under O. 53 r. 2(3) of the Rules of Court 2012 (RC) to:

(1) grant a *certiorari* order to set aside the competent authority's decision; and

(2) give an order of *mandamus* to direct the accused to be re-tried by court-martial?

Background

[3] On 17 September 2020, the respondent was ordered to provide a urine sample (sample) in the camp so as to detect whether the sample contained any substance which was prohibited by a SO entitled "Perintah Bahagian Pertama Batalion Kedua Belas, Regimen Askar Melayu DiRaja (Mekanize) Bil. 21" dated 31 August 2020 (relevant SO).

[4] The sample was sent to the Chemistry Department of Malaysia (CDM). At the CDM, the sample was analysed by Puan Manja Murni Bt Che Khalid (chemist) who gave a report dated 19 October 2020 (chemist report). According to the chemist report, the sample contained "methamphetamine", a substance prohibited by the relevant SO.

[5] A letter dated 30 October 2020 was sent to the respondent which informed the respondent as follows, among others:

(i) the chemist report had been received by the armed forces; and

(ii) the commanding officer would interview (temu duga) the respondent on 11 November 2020.

[6] On 9 November 2020, the chemist report was served on the respondent.

[7] The respondent served a letter dated 19 November 2020 on the first appellant which requested for the chemist to give evidence at the summary trial (respondent's request).

[8] The summary trial was postponed to 27 November 2020. The following matters, among others, transpired at the summary trial:

(i) the first appellant read out the charge to the respondent, *ie*, the respondent was charged with disobedience to the relevant SO (the respondent had provided the sample which contained a prohibited substance);

(ii) the respondent was asked by the first appellant on whether the respondent understood the charge to which the respondent replied that he understood the charge;

(iii) the first appellant inquired from the respondent on whether the respondent had received the chemist report ten clear days before the commencement of the summary trial. The respondent answered in the affirmative;

(iv) seven witnesses were called by the first appellant (seven witnesses) to give evidence on the following matters, among others:

(a) the taking of the sample from the respondent in a specimen bottle (bottle);

(b) the recording of the respondent's details on the bottle and the sealing of the bottle were done in the presence of the respondent;

(c) in the respondent's presence, the bottle was placed in a specimen bag which was secured with a security tag (bag);

(d) the bag was handed to the chemist in CDM for analysis; and

(e) upon receipt of the chemist report from CDM, the chemist report was served on the respondent;

(v) the respondent did not cross-examine the seven witnesses (no cross-examination (seven witnesses));

(vi) the first appellant found that a *prima facie* case of the charge had been proven against the respondent. The first respondent explained to the respondent that the respondent had the following three options:

(a) option to remain silent;

(b) option to give sworn evidence; and

(c) option to give unsworn evidence;

(vii) the respondent chose the option to give sworn evidence. According to the respondent, he had never taken drugs;

(viii) the respondent did not call any other person to give evidence on his behalf; and

(ix) the first appellant found that the charge had been proven against the respondent (first appellant's finding of guilt);

(x) before the first appellant imposed punishment on the respondent:

(a) the first appellant had allowed the respondent to make a plea in mitigation of the punishment which could be meted out by the first appellant to the respondent;

(b) the respondent was also permitted by the first appellant to call a character witness who gave evidence of the respondent's good character; and

(c) the respondent's service record showed that throughout the respondent's service of 19 years and two months in RMR:

(1) the respondent had not been guilty of any disciplinary offence; and

(2) the respondent's work performance was good; and

(xi) the first appellant ordered the respondent to pay a fine which was equivalent to the respondent's wages for 14 days (fine). This judgment shall refer the first appellant's finding of guilt and fine collectively as the "first appellant's decision".

[9] By way of a letter dated 11 January 2021, the second appellant discharged the respondent from service under reg. 61(1)(m) of the AFTSR on the ground that the respondent's service was no longer required (second appellant's decision). The title of the second appellant's decision stated as follows (in the National language):

> **Kelulusan Pemberhentian Atas Sebab Tatatertib Salah Laku Dan Sebab-sebab Lain Anggota Lain-lain Pangkat (LLP)**
>
> (emphasis added).

Proceedings In The High Court

[10] The respondent filed a judicial review application (JRA) in the High Court and sought for the following relief, among others:

(i) a *certiorari* order to set aside:

  (a) the first appellant's decision; and

  (b) the second appellant's decision; and

(ii) an order of *mandamus* to direct the respondent to be re-tried by court-martial.

[11] As required by O. 53 r. 3(2) of the RC, the JRA was supported by a statement (statement). Paragraphs 9 and 10 of the statement have laid down the following grounds for the relief sought in the JRA:

(i) when the first appellant refused to call the chemist to give evidence at the summary trial:

  (a) the first appellant had committed an error of law and/or an illegality;

  (b) the first appellant had exceeded his jurisdiction and/or had committed an error regarding his jurisdiction;

  (c) the first appellant had acted irrationally and/or had not considered relevant factors; and/or

  (d) the first appellant had committed a procedural impropriety; and

(ii) the first appellant's decision was unreasonable in the *Wednesbury* context.

The statement did not provide any ground for the court to set aside the second appellant's decision.

[12] The learned High Court Judge (HCJ) granted *ex parte* leave for the JRA and at the substantive hearing of the JRA, the learned HCJ allowed the JRA as follows:

(i) an order of *certiorari* was issued to quash:

  (a) the first appellant's decision; and

  (b) the second appellant's decision;

(ii) a *mandamus* order was granted for the respondent to be re-tried by court-martial; and

(iii) no order of costs for the JRA.

(High Court's decision).

[13] Paragraphs 17 to 19 of the learned HCJ's grounds of judgment (GOJ) gave the following grounds for the High Court's decision:

(i) in view of the respondent's request, the first appellant should have called the chemist to give evidence at the summary trial;

(ii) the chemist should be called by the first appellant to testify at the summary trial because it was important for the respondent to know what test and analysis of the sample had been conducted by the chemist. Consequently, the respondent had been irreparably prejudiced by the first respondent's failure to call the chemist to give evidence at the summary trial;

(iii) no reason was given by the first appellant on why the chemist could not be called to give evidence at the summary trial;

(iv) the first appellant had erred in deciding that there was proof of a *prima facie* case of the charge when the first appellant did not refer to the chemist report; and

(v) the first appellant's failure to call the chemist to testify at the summary trial had deprived the respondent of the respondent's right to cross-examine the chemist. Hence, there was procedural impropriety which invalidated the first appellant's decision and second appellant's decision.

[14] The appellants have appealed to this court against the entire High Court's decision.

Summary Of Appellants' Submission

[15] In support of this appeal, the learned Senior Federal Counsel (SFC) has contended as follows, among others:

(i) as the first appellant had only imposed the fine on the respondent, s. 97(9) of the AFA did not require the first appellant to accord the respondent the right to elect to be tried by court-martial;

(ii) the first appellant was not required to call the chemist to testify at the summary trial because:

(a) the proviso to s. 399(1) of the CPC had been fulfilled as the chemist report had been served on the respondent more than ten clear days before the commencement of the summary trial;

(b) the chemist report had been tendered as evidence at the summary trial without any objection by the respondent;

(c) there was no cross-examination (seven witnesses) by the respondent; and

(d) the respondent could have called the chemist to testify in support of his defence at the summary trial but he chose not do so.

Premised on the above reasons, there was no procedural impropriety in the conduct of the summary trial by the first appellant; and

(iii) the second appellant's decision was lawfully made pursuant to reg. 61(1)(m) of the AFTSR. In any event, there was no nexus between the first appellant's decision and second appellant's decision. This is because even if the first appellant's decision was quashed by a *certiorari* order, the second appellant was empowered under reg. 61(1)(m) of the AFTSR to make the second appellant's decision.

Summary Of Respondent's Contentions

[16] The respondent's learned counsel has resisted this appeal on the following grounds, among others:

(i) by virtue of s. 97(9) of the AFA, the first appellant's finding of guilt was invalid because the first appellant did not allow the respondent to exercise his right to elect to be court-martialled;

(ii) notwithstanding the respondent's request, the first appellant failed to call the chemist to give evidence at the summary trial. There was therefore procedural impropriety in the first appellant's conduct of the summary trial;

(iii) instead of one sample, two urine samples should be obtained from the respondent;

(iv) the sample was contaminated when there was a preliminary testing of the sample in the camp (before the sample was sent to the chemist); and

(v) in view of the above reasons, the respondent's constitutional rights under arts. 5(1) and 8(1) of the Federal Constitution (FC) had been violated. Hence, the learned HCJ did not err in making the High Court's decision.

Our Decision

Did First Appellant Breach Section 97(9) Of The AFA?

[17] Sections 51, 95, 96 and 97 of the AFA state as follows:

s. 51 Disobedience to standing orders

(1) *Every person subject to service law under this Act who contravenes or fails to comply with any provision of orders to which this section applies, being a provision known to him or which he might reasonably be expected to know, shall, on conviction by court martial, be liable to imprisonment for a term not exceeding two years or any less punishment provided by this Act.*

(2) *This section applies to standing orders* or other routine orders of a continuing nature *for any formation or unit or body of troops, or for any command or other area, establishment, garrison or place*, or for any ship, train or aircraft.

(3) The standing orders or other routine orders described in subsection (2) may be:

(a) made by; and

(b) published in such manner as may be determined by, the Service Chief for each Service or any officer authorized by him.

s 95 Investigation of charges by commanding officers

Before an allegation against a person subject to service law under this Act (hereinafter referred to as "the accused") that he has committed an offence against any provision of this Part is further proceeded with, the allegation shall be reported, in the form of a charge, to the accused's commanding officer, and the commanding officer shall investigate the charge in the prescribed manner.

s 96 charges to be dealt with summarily or by court martial

(1) After investigation, a charge against a commissioned officer below the rank of lieutenant-colonel or its equivalent or against a warrant officer may, if an authority has power under the following provisions of this Part to deal with it summarily, be so dealt with by that authority in accordance with those provisions.

(2) *After investigation, a charge against* an appointed officer or against *a serviceman* or volunteer (when subject to service law under this Act) *below the rank of warrant officer may be dealt with summarily by his commanding officer, subject to and in accordance with the following provisions of this Part.*

(3) *If, after investigation, any charge is not dealt with summarily as aforesaid, the accused shall be remanded for trial by court-martial.*

(4) *Notwithstanding anything in the foregoing provisions of this section, where*:

(a) the commanding officer has investigated a charge against a commissioned officer or a warrant officer; or

(b) *the commanding officer has investigated a charge* against an appointed officer or *against a serviceman* or volunteer (when subject to service law under this Act) *below the rank of warrant officer, which is not one which can be dealt with summarily*,

the commanding officer may dismiss the charge if he is of the opinion that it ought not to be further proceeded with.

(5) *References in this Act to dealing summarily with the charge are references to the taking by the appropriate superior authority or the commanding officer of the accused, as the case may require, of the following action, that is to say, determining whether the accused is guilty, dismissing the charge or recording a finding of guilty accordingly and awarding punishment.*

s 97 Further proceedings on charges against an appointed officer, servicemen and volunteers below the rank of warrant officer

(1) *The following provisions of this section shall have effect where the commanding officer has investigated a charge* against an appointed officer or *against a serviceman* or volunteer (when subject to service law under this Act) *below the rank of warrant officer*.

(2) *If:*

(a) *the charge is not one which can be dealt with summarily and the commanding officer has not dismissed it; or*

(b) *the charge is one which can be dealt with summarily but the commanding officer is of the opinion that it should not be so dealt with,*

he shall take the prescribed steps with a view to the charge being tried by court-martial.

(3) *In any other case, the commanding officer shall proceed to deal with the charge summarily; and if he records a finding of guilty he may, subject to subsection (4), award one or more of the following punishments, that is to say*:

(a) detention for a period not exceeding ninety days, or if the accused being a non-commissioned officer or private or its equivalent is on active service, field punishment not exceeding ninety days:

Provided that:

(i) a punishment of detention or field punishment awarded by a commanding officer to a non-commissioned officer shall not be carried into effect until it has been approved by an approving authority and only to the extent so approved;

(ii) where a commanding officer awards more than twenty-eight days' detention or field punishment, the portion in excess of twenty-eight days shall be effective only if approved by, and to the extent approved by, an approving authority;

(b) reduction to the ranks or any less reduction in rank or disrating to a rank not lower than a private or its equivalent in the Army, able rate in the Navy or aircraftman I in the Air Force, as the case may be, but, except as provided in subsections (5) and (6), a punishment of reduction to the ranks or any less reduction in rank or disrating to a rank not lower than a private or its equivalent in the Army, able rate in the Navy or aircraftman I in the Air Force, as the case may be, imposed by a commanding officer shall be effective only if approved by, and to the extent approved by, an approving authority;

(c) *a fine*;

(d) if the accused is an appointed officer or non-commissioned officer, severe reprimand or reprimand;

(e) forfeiture of good conduct badges, but where such forfeiture will entail the forfeiture of a long service and good conduct medal, a punishment of forfeiture of good conduct badges shall be effective only if approved by an approving authority;

A (f) where the offence has occasioned any expense, loss or damage, stoppages;

(g) any minor punishments for the time being authorized in regulations made under this Part:

B Provided that no fine or minor punishment shall be awarded for an offence for which detention is awarded, and that no fine shall be awarded for an offence for which field punishment is awarded.

(4) If the accused is an appointed officer the commanding officer shall not award any punishment other than those set out in paragraphs (c), (d), (f) C and (g) of the last foregoing subsection.

(5) Where the accused is a lance corporal or lance bombardier, and the commanding officer finds him guilty, the commanding officer may, if he awards no other punishment or no other punishment except stoppages, order the accused to be reduced to the ranks.

D (6) Where the accused is an acting warrant officer or acting non-commissioned officer, and the commanding officer finds him guilty, the commanding officer may, if he awards no other punishment or no other punishment except stoppages, order the accused to revert to his permanent rank or rate.

E (7) Where a non-commissioned officer is awarded any period of detention or field punishment, he shall also be ordered to be reduced to the ranks or to be disrated to a grade lower than that of leading rating, as the case may be:

F Provided that, if the commanding officer fails to order him to be so reduced, the sentence of the commanding officer shall not be invalid but shall be deemed to include a sentence of reduction to the ranks or of disrating to a grade lower than that of leading rating as the case may be.

(8) Where a commanding officer awards a fine as a punishment for drunkenness, the amount of the fine shall not exceed thirty ringgit.

G (9) *Notwithstanding anything contained in subsection (3), where the commanding officer has determined that the accused is guilty and if the charge is dealt with summarily will award punishment other than severe reprimand, reprimand, fine or a minor punishment, or where a finding of guilty (whatever the punishment awarded) will involve a forfeiture of pay (other than a fine), the commanding officer shall not* H *record a finding until after affording the accused an opportunity of electing to be tried by court-martial; and if the accused so elects and does not subsequently, in accordance with regulations made under this Part withdraw his election, the commanding officer shall not record a finding of guilty but shall take the prescribed steps with a view to the charge being tried by court-martial.*

I (10) In this section "approving authority" means any officer not below the rank of colonel or its equivalent designated by the Armed Forces Council as an approving authority for the purposes of this section.

(11) *Where a charge is one that can be dealt with summarily, but the commanding officer has taken steps with a view to its being tried by court-martial, any higher authority to whom the charge is referred may refer the charge back to the commanding officer to be dealt with summarily; and on any such reference the commanding officer shall dispose of the charge as if he had originally been of the opinion that the charge should be dealt with summarily*:

Provided that a charge shall not be referred back where the accused has elected to be tried by court-martial and has not withdrawn his election.

(emphasis added)

[18] We are of the following view regarding a commanding officer's duties and discretionary powers with regard to a complaint that an accused has breached a SO pursuant to s. 51 of the AFA:

(i) section 95 of the AFA mandatorily requires the accused's commanding officer to investigate the charge against the accused (investigation);

(ii) after the investigation:

(a) the commanding officer may dismiss the charge under s. 96(4) of the AFA read with reg. 14(1) of the AFSJR. We reproduce below reg. 14(1) of the AFSJR:

reg. 14 Restrictions on power to dismiss a charge.

(1) *A commanding officer shall not dismiss a charge unless he is satisfied:*

(a) *that the charge is groundless; or*

(b) *that there are special circumstances which justify its dismissal.*

(emphasis added); or

(b) if the commanding officer does not dismiss the charge pursuant to s. 96(4) of the AFA and reg. 14(1) of the AFSJR:

(1) the commanding officer has a discretion to deal summarily with the charge if the charge is one which can be dealt with summarily by the commanding officer – please refer to ss. 96(2), 97(2)(a), (b) and (3) of the AFA read with reg. 12 of the AFSJR. Regulation 12 of the AFSJR states as follows:

reg. 12 *charges with which a commanding officer* or appropriate superior authority *may deal summarily*.

A commanding officer or an appropriate superior authority *may deal summarily with a charge under any of the following sections of [AFA]*: 44, 46(e), 49, 50(2), 51, 52, 55, 56, 57, 58, 59(1)(a), 60, 61(c) and (d), 62(c), 63, 64, 65(2), 66, 67, 72, 77(a) and 81(b) , 86 (where the principal offence can be dealt with summarily by virtue of this Regulation); 87 and 88 (where the civil offence is one which is specified in the Second Schedule to these Regulations).

or

(2) the commanding officer shall take steps prescribed by of the AFA for the accused to be court-martialled in the following circumstances:

(i) the charge is one which cannot be dealt with summarily by the commanding officer – please refer to s. 97(2)(a) of the AFA; or

(ii) the charge is one which can be dealt with summarily by the commanding officer but the commanding officer is of the opinion that the charge should not be dealt with summarily – please refer to s. 97(2)(b) of the AFA (s. 97(2)(b) option);

(emphasis added)

(iii) if a commanding officer exercises s. 97(2)(b) option, *ie*, if a commanding officer takes steps for the court-martial of the accused, by reason of s. 97(11) of the AFA, a higher authority than the commanding officer may refer the charge back to the commanding officer for the charge to be dealt with summarily by the commanding officer. Such a reference back to the commanding officer is not available when an accused has elected to be tried by court-martial under s. 97(9) of the AFA – please refer to the proviso to s. 97(11) of the AFA and sub-para. (5) below;

(iv) according to s. 96(5) of the AFA, a commanding officer deals summarily with the charge by:

(a) dismissing the charge; or

(b) finding that the accused is guilty of the charge by recording such a finding of guilty and by awarding punishment of the accused as provided in s. 97(3)(a) to (g) of the AFA (subject to the specific provisions in s. 97(4), (5), (6), (7) and (8) of the AFA). In this regard, reg. 13 AFSJR has provided that a commanding officer may award any of the punishments prescribed under, among others, s. 97 of the AFA; and

(v) when a commanding officer deals summarily with the charge and has determined that the accused is guilty and:

(a) if commanding officer will award the following punishment which is not a:

(1) a severe reprimand;

(2) a reprimand;

(3) a fine; or

(4) a minor punishment, or

(b) where a finding of guilty (whatever the punishment awarded) will involve a forfeiture of pay (other than a fine),

the commanding officer shall not record a finding of guilty until the commanding officer has given the accused a right to elect to be tried by court-martial.

If the accused elects to be court-martialled and does not subsequently withdraw his or her election in accordance with regulations made under Part V of the AFA, the commanding officer shall not record a finding of guilty but shall take steps prescribed by the AFA for the court-martial of the accused.

[19] We do not accept the respondent's contention that the first appellant had breached s. 97(9) of the AFA by not affording the respondent a right to elect to be tried by court-martial. This is because the first appellant had only imposed the fine on the respondent. As explained in the above sub-para. 18(5), s. 97(9) of the AFA did not require the first appellant to give the respondent a right to elect to be court-martialled. Our research has shown that a similar decision was reached by Ahmad Kamal Md Shahid J in the High Court in *Wan Ramli Wan Seman v. Lt Kol Sharull Hesham Md Yasin & Ors* [2023] 1 LNS 1086; [2023] MLJU 1264, at [18].

Whether Taking Of One Sample From Respondent Was Valid

[20] We cannot accept the respondent's submission that two urine samples should have been obtained from the respondent. We rely on the Court of Appeal's judgment delivered by Abdul Rahman Sebli JCA (as he then was) in *Majlis Angkatan Tentera Malaysia v. Mohd Nurul Ami Mohd Basri* [2019] 2 CLJ 772; [2019] 2 MLJ 433, at [8], [9], [11], [12], [14], [15], [18], [26], [27], [29] and [30] to [35], as follows:

[8] *The dispute that arose was over how many bottles of urine sample was required to be taken for the purposes of a urine test. Under the army guideline, only one bottle is required whereas under the KKM [Kementerian Kesihatan Malaysia] guideline, two bottles are required.*

[9] *In the case of the respondent, only one bottle of his urine sample was taken, which tested positive for the drugs methamphetamine and amphetamine. It was this test result that formed the basis for the charge against him. It was therefore important for the court to determine if the procedure adopted by the appellant in collecting urine samples for the purposes of urine tests was in accordance with the law.*

...

[11] *The question before us was simply this – which guideline applies, the army guideline or the KKM guideline?* The learned judge ruled that it is the KKM guideline that applies and not the army guideline. *The KKM guideline, inter alia, provides for the following procedure in the collection of urine samples*:

…

[12] *Learned counsel for the respondent contended that this guideline requires two bottles of urine sample to be taken. We read it differently. Our reading of para (c)(i) is that only one bottle of urine specimen is required, but a 'duplicate' ie a second bottle*

is required if the screening and confirmation are done in two different places. What is important is for the single bottle to contain at least 30ml of urine sample.

…

[14] For a comparison of the KKM guideline with the army guideline, we reproduce below the relevant parts of the army guideline: …

[15] *As is the case with the KKM guideline, the army guideline requires only one bottle of urine specimen to be taken. And like the KKM guideline, the army guideline also requires each bottle to contain at least 30ml of urine specimen. So basically the requirements of both guidelines are the same*.

…

[18] *But that is not the end of the matter. The question is not whether one or two bottles should be taken, but whether the procedure to be followed by the appellant is the KKM guideline or the army guideline. If it is the KKM guideline that must be followed, two bottles must be taken (since the screening and confirmation were done in two different places) but if the army guideline applies, only one bottle is required*.

…

[26] *What then is the status of the army guideline? Does it have any force of law? In our view it does. The first thing to note is that it was made under s. 15 [AFA] read together with art 137 of the Federal Constitution ('the Constitution')*.

[27] *The army guideline*, which can be found at pp 70-80 of the appeal record is dated 14 May 2009 and *was signed by the Secretary of the Armed Forces Council. He signed it 'Dengan Perintah Majlis Angkatan Tentera'. There can be no doubt therefore that the army guideline is a guideline that was issued pursuant to a power given by law*.

…

[29] *Thus, by virtue of s. 15 [AFA], the Armed Forces Council is empowered by law to make regulations it may think necessary or expedient for the better carrying into effect of the AFA, and this includes issuing the army guideline, which was issued by way of the 'Perintah Majlis Angkatan Tentera'. Being made by authority of the Armed Forces Council, the army guideline is therefore valid and enforceable*.

[30] *What about the KKM guideline, does it have any force of law? With regret and with the greatest of respect to the panel of this court that decided Noor Shariful Rizal, we are unable to agree that the KKM guideline has the force of law. In the first place, unlike the army guideline, it was not made under any written law*.

[31] *The KKM guideline was merely a guideline issued by the Ministry of Health through a circular dated 3 September 2002 and signed by the Director General of the Ministry of Health. The fact that the KKM guideline makes references to the Dangerous Drugs Act 1952 as observed by this court in Noor Shariful Rizal does not clothe it with the force of law*.

[32] *Paragraphs 1 and 2 of the circular fortifies our view that it is merely an administrative guideline with no force of law*.

…

[33] *It is patently clear that the purpose of the KKM guideline is to coordinate and update the procedure for the taking of urine samples in suspected drug abuse cases and as a guideline to the relevant agencies, including the armed forces. It was not meant to be a legal document having the force of law. For any guideline to have any force of law, it must be made pursuant to a power given by law. This is not the case with the KKM guideline.*

[34] *Since the procedure adopted by the appellant in taking only one bottle of the respondent's urine specimen for his urine test was in accordance with the army guideline, the question that the appellant had breached the KKM guideline by not taking two bottles of his urine sample does not arise, and this is so even if the KKM guideline has the force of law, and assuming we are wrong in holding the view that it has no force of law.*

[35] *In any event, even if the KKM guideline has the force of law, it cannot supersede the army guideline. This is because the army guideline is a specific guideline which is meant to be enforced by the armed forces only and by no others and it is enforceable against all members of the armed forces without any exception.*

(emphasis added)

Does Section 399(1) Of The CPC Apply To Summary Trial Under AFA?

[21] Sections 3 and 399 of the CPC provide as follows:

s. 3 Trial of offences under Penal Code and other laws

All offences under the Penal Code shall be inquired into and tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into and tried according to the same provisions: subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences.

s 399 reports of certain persons

(1) *Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) upon any person, matter or thing examined or analysed by him* or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report *may be given in evidence in any inquiry, trial or other proceeding under this Code* unless that person or Registrar shall be required to attend as a witness:

(a) by the Court; or

(b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial.

(2) *The following are persons to whom the provisions of this section apply*:

(a) officers of the Institute for Medical Research;

(b) Government Medical Officers;

A (c) *chemists in the employment of any Government in Malaysia* or of the Government of Singapore;

(d) any person appointed by the Minister by notification in the *Gazette*, to be a Document Examiner;

B (e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in Malaysia; and

(f) any person or class of persons to whom the Minister by notification in the *Gazette* declares that the provisions of this section shall apply.

C (3) The persons referred to in subsection (2) and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands. (emphasis added)

[22] We are of the view that the learned SFC's reliance on the proviso to s. 399(1) of the CPC to justify the first appellant's refusal to call the chemist at the summary trial is misplaced. Our reasons are as follows:

D

(i) section 3 of the CPC has expressly provided that all "offences under the Penal Code" (PC) and "offences under any other law" "shall be inquired into and tried" according to the CPC, including s. 399 of the CPC. The charge in this case concerned disobedience to the relevant SO and did not involve a criminal offence under the PC, AFA or any other law. Accordingly, all provisions in the CPC, including s. 399 of the CPC, cannot apply in this case.

E

At this juncture, we should clarify that although reg. 16 of the AFSJR uses the description "summary trial", a summary trial conducted by a commanding officer is different from a summary trial conducted by a "court" (defined in s. 2(1) of the CPC as the High Court, Sessions Court or Magistrate's Court);

F

(ii) section 399(1) of the CPC has stated that a chemist report "may be given in evidence in any inquiry, trial or other proceeding" under the CPC, (not under the AFA and AFSJR); and

G

(iii) the proviso to s. 399(1) of the CPC only enables the Public Prosecutor (PP) (not the commanding officer) to tender a chemist report in a criminal trial if the PP has served the chemist report on an accused person not less than ten clear days before the commencement of the criminal trial. As such, a commanding officer cannot rely on the proviso to s. 399(1) of the CPC.

H

Whether Court May Review Commanding Officer's Decision After Summary Trial (Commanding Officer's Decision (Summary Trial))

I **[23]** Firstly, by virtue of arts. 5(1) and 8(1) of the FC, a serviceman has a constitutional right to livelihood in respect of his or her service in the armed forces (constitutional right to livelihood) – please refer to the Federal Court's

judgment delivered by Mary Lim FCJ in *Kolonel Dr Faiz Azraai Abdul Aziz v. Mahkamah Tentera Divisyen Keempat Infantri Malaysia* [2023] 5 CLJ 843; [2023] MLJU 998, at [26].

[24] Secondly, as decided in *Kolonel Dr Faiz Azraai*, at [19], the court may review a court-martial decision.

[25] Thirdly, we are of the considered view that a commanding officer's decision (summary trial) is amenable to judicial review. This view is supported by the following reasons:

(i) there is no policy reason to exclude judicial review of a commanding officer's decision (summary trial);

(ii) if the court can review a court-martial decision (please refer to *Kolonel Dr Faiz Azraai*), there is nothing in principle to exclude the court's review of a commanding officer's decision (summary trial);

(iii) if there is no judicial review of a commanding officer's decision (summary trial) there will be an injustice to the serviceman who is found guilty and punished notwithstanding that there may exist any one or more of the following three grounds for judicial review (three grounds (judicial review)):

(a) the commanding officer has committed an illegality or error of law with regard to the summary trial;

(b) there is procedural impropriety, procedural unfairness or breach of the rules of natural justice in respect of the conduct of the summary trial; and/or

(c) the commanding officer's decision (summary trial) is "irrational" as understood in case law.

when there is presence of any one or more of the three grounds (judicial review) and if the court has no jurisdiction to review a commanding officer's decision (summary trial) which is adverse to a serviceman, the serviceman's constitutional right to livelihood is rendered illusory; and

(iv) this court takes judicial notice that our military personnel answer the calling to serve our country selflessly as a matter of personal honour. To quote William Shakespeare in "Richard II", Act 1, Scene 1:

> Mine honour is my life; both grow in one.
>
> Take honour from me, and my life is done.

If a commanding officer's decision (summary trial) has a negative impact on a serviceman's professional reputation, the court should have the jurisdiction to review the commanding officer's decision (summary trial) so as to vindicate the serviceman's personal honour.

Was There Procedural Impropriety In Summary Trial?

[26] We now discuss the novel question of whether the first appellant had committed a procedural impropriety by refusing to call the chemist to give expert evidence and be cross-examined by the respondent at the summary trial.

[27] In the High Court case of *Malayawata Steel Bhd v. Union Of Malayawata Steel Workers* [1977] 1 LNS 69; [1978] 1 MLJ 87, at 88, Gunn Chit Tuan J (as he then was) has decided as follows:

> *In reaching a decision in relation to a trade dispute referred to an Industrial Court under section 30 of the Industrial Relations Act, 1967 (Revised 1976), the hearing before it should be in accordance with the rules of natural justice. Thus in his judgment in Russell v. Duke of Norfolk* [1949] 1 All ER 109 at page 118, *Lord Justice Tucker has said as follows*:
>
> > *There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.*
>
> *In this case, I took the view that there had been a denial of natural justice in that the applicant was not allowed to call witnesses and was therefore not given a reasonable opportunity of presenting its case. Since there had been a denial of natural justice, the High Court was in a position to interfere and to make an order of certiorari.* (emphasis added)

[28] We have no hesitation to uphold part of the High Court's decision that the first appellant's decision had been made due to a procedural impropriety, namely, the respondent had been deprived of a reasonable opportunity of presenting the respondent's defence at the summary trial when the first appellant failed to call the chemist to give expert evidence and be cross-examined by the respondent at the summary trial (first appellant's procedural impropriety). This decision is premised on the following evidence and reasons:

(i) it could not be denied that the gravamen of the charge depended solely on the expert evidence of the chemist. In other words, the chemist's expert testimony was crucial to prove the charge against the respondent beyond all reasonable doubt;

(ii) the respondent's request had been sent to the first appellant. There was no evidence that the chemist was not available to testify at the summary trial;

(iii) before the commencement of the summary trial, the first appellant did not inform the respondent that the first appellant would not accede to the respondent's request. Hence, the respondent was not able to make any arrangement to call the chemist to give an expert opinion at the summary trial; and

(iv) the summary trial had been postponed once. There was no reason why the summary trial could not be postponed a second time so as to enable the first appellant to call the chemist to give expert evidence at the summary trial. In this regard, we rely on the following judgment of Roskill LJ (as he then was) in United Kingdom's (UK) Court of Appeal case of *Hanson v. Church Commissioners for England, R v. London Rent Assessment Committee, ex p Hanson* [1978] QB 823, at 838:

> *I am very conscious of the irritation as well as the extra expense which last minute adjournments can cause, particularly with tribunals of this nature, and I recognise the desire of any tribunal to avoid such adjournments wherever possible. But sometimes, if justice is to be done, adjournments are essential.* (emphasis added)

Court's Discretion To Grant Relief In the JRA

[29] Order 53 r. 2(3) of the RC provides as follows:

> **Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may** dismiss the application or **make any orders**, including an order of injunction or monetary compensation:
>
> Provided that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1956 [Act 359] and section 54 of the Specific Relief Act 1950. (emphasis added)

[30] As provided by the words "may … make any orders" in O. 53 r. 2(3) of the RC, if there exists any one of the three grounds (JR), the court has a discretion to grant or refuse relief in a JRA. In the Federal Court case of *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369, at 393 to 394, Gopal Sri Ram JCA (as he then was) has decided as follows:

> *In any event, assuming for a moment that the Industrial Court had given wrong reasons for holding that the appellant is a workman within the Act – and we hasten to repeat that this is not the case here – its ultimate decision being correct, prerogative relief whether in the form of certiorari or prohibition ought to have been withheld from the respondent. For, it must not be forgotten that these remedies are discretionary and are not available ex debito justitiae to an applicant who is able to demonstrate an error of law on the part of a public decision-taker.*
>
> *The true principle governing the grant of prerogative relief appears in the following passage in the judgment of Bose J in Sangram Singh v. Election Tribunal AIR 1955 SC 425 at p 429*:

> *That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be*. Therefore, writ petitions should not be lightly entertained in this class of case.

In Kewal Krishnan v. Minister for Local Bodies & Ors AIR 1959 J & K 17, the order of the Minister was challenged on the ground, inter alia, that the reasons contained in the order made by him contained wrong reasons for his decision. Wazir CJ, in refusing relief said (at p 19):

> *Although the reasons given in the order of the Minister may be erroneous yet if the order can be supported on other valid grounds, writ of certiorari to quash that order cannot be granted*.

Suffice to say that in the circumstances of this case, the ultimate decision being correct, no injustice of any sort, whether substantial or inconsequential, has been occasioned because of the alleged wrong reasons. (emphasis added)

Whether High Court Had Correctly Exercised Discretion To Set Aside First Appellant's Decision

[31] We have no hesitation to decide that the learned HCJ had exercised lawfully his discretion to issue a *certiorari* order to quash the first appellant's decision. This is because the first appellant's procedural impropriety had caused an injustice to the respondent by adversely affecting the respondent's constitutional right to livelihood.

[32] We are not persuaded that the any one or all of the following grounds can justify a refusal by the High Court to set aside the first appellant's decision:

(i) the respondent has not objected to the admissibility of the chemist report at the summary trial;

(ii) No cross-examination (seven witnesses); and

(iii) the respondent could have called the chemist to testify for the respondent at the summary trial.

We do not accept the above grounds due to the following reasons:

(i) premised on the nature of the charge, the respondent could only be found guilty of the charge beyond all reasonable doubt if the first appellant had called the chemist to provide her expert opinion in the summary trial;

(ii) the matters raised by the learned SFC in the above sub-paras. (1) to (3) could not be tantamount to proof beyond all reasonable doubt that the respondent was guilty of the charge; and

(iii) the respondent was not legally represented at the summary trial. It was therefore understandable as to why the respondent acted the way he did at the summary trial.

Whether Second Appellant's Decision Should Be Set Aside

[33] We reproduce below reg. 61 of the AFTSR:

reg. 61 Discharge from service

(1) *The competent authority may, at any time, discharge any serviceman from the service of the regular forces on the following grounds*:

(a) in the case of a recruit, he is unlikely to become an efficient serviceman;

(b) in the case of a recruit, upon him applying to purchase his discharge pursuant to section 31 of the Act;

(c) the enlistment of the serviceman is not approved;

(d) the enlistment of the serviceman was not properly made;

(e) the particulars written in the attestation paper during the enlistment of such serviceman are false;

(f) mercy;

(g) the state of health of such serviceman is lower than the medical standards as determined under regulation 11;

(h) the lack of a suitable post or the absence of prospects for promotion or career development for the serviceman in the regular forces or the abolition of any post in the regular forces;

(i) unfitness or inefficiency of such serviceman which is not tantamount to a misconduct;

(j) misconduct committed by the serviceman and he has been convicted;

(k) the serviceman has been sentenced to a discharge or discharge with disgrace by court-martial;

(l) renunciation or loss of Malaysian citizenship;

(m) *the service of the serviceman is no longer required*;

(n) in the interest of the service;

(o) with the approval of the Armed Forces Council, upon the serviceman being appointed to serve in any organisation in which the Government or any State Government has an interest;

(p) the serviceman is found to be involved in political activities as prohibited in Perintah Majlis Angkatan Tentera;

(q) the serviceman has completed his period of full-time service in the regular forces;

(r) the serviceman has been granted a commission as an officer; or

(s) in the opinion of the competent authority, a particular circumstance requires so.

(2) Notwithstanding any provisions in these Regulations, a warrant officer who has been reduced to a lower rank may apply to be discharged from the service of the regular forces and the competent authority, after considering his application, may discharge such warrant officer pursuant to section 32 of the Act.

(3) *The discharge under this regulation shall be in accord for the purpose of determining the grant of pension, gratuity and other benefits as provided in the regulations made under section 187 of the Act*. (emphasis added)

[34] We are of the following view regarding reg. 61(1)(m) of the AFTSR:

(i) according to reg. 61(3) of the AFTSR, a serviceman who is discharged from service under reg. 61 of the AFTSR is entitled to his or her pension, gratuity and all other benefits.

Articles 5(1) and 8(1) of the FC provide as follows:

> Article 5(1) *No person shall be deprived of his life or personal liberty save in accordance with law*.
>
> Article 8(1) *All persons are equal before the law and entitled to the equal protection of the law*.
>
> (emphasis added)

The term "law" is defined in art. 160(2) of the FC to include "written law". By reason of s. 3(b) of the Interpretation Acts 1948 and 1967, "written law" means, among others, subsidiary legislation made under an Act of Parliament. AFTSR (made pursuant to ss. 15 and 36 of the AFA) constitute subsidiary legislation and "law" as provided in arts. 5(1) and 8(1) FC. Accordingly, reg. 61(1)(m) of the AFTSR does not breach a serviceman's constitutional right to livelihood under arts. 5(1) and 8(1) of the FC because a serviceman's constitutional right to livelihood may be lawfully deprived in accordance with reg. 61(1)(m) of the AFTSR (which constitutes "law" as understood in arts. 5(1) and 8(1) of the FC);

(ii) a literal interpretation of reg. 61(1)(m) AFTSR means that the competent authority has a discretion to discharge a serviceman "at any time" from service on the ground that the "service of the serviceman is no longer required" (literal interpretation);

(iii) before the competent authority decides to discharge a serviceman from service pursuant to reg. 61(1)(m) of the AFTSR, the literal interpretation does not require the competent authority to give the serviceman a right of hearing;

(iv) once the competent authority has exercised the discretionary power under reg. 61(1)(m) of the AFTSR to discharge a serviceman from service on the ground that the serviceman's service is no longer required, the competent authority is not required by the literal interpretation to give any reason for that decision to the serviceman in question;

(v) with regard to matters concerning the administration of our Armed Forces and national security, including the discharge of a serviceman from service, the court should defer to the exercise of the competent authority's subjective discretion pursuant to reg. 61(1)(m) of the AFTSR (purposive construction). The purposive construction is explained by Malin VC in UK's High Court in *Re Tufnell* (1876) 3 Ch D 164, at 172 and 177, as follows:

> I am sorry to be obliged to come to the conclusion that the case is entirely against Mr. Tufnell. This is a petition of right claiming compensation against the Crown, not for dismissal from any office, but for removal in this sense, that instead of continuing to hold the office he has been put on half-pay. …
>
> …
>
> *That litigation has resulted in shewing most clearly that every officer in the army is subject to the will of the Crown, and can be removed and put on half-pay, or dealt with as the Crown, with a view to the public convenience, thinks best. It is a power which is always considered to lie in the Crown, a rule which has never been departed from, and therefore, on general principles, I come to the conclusion that Mr. Tufnell has no ground whatever to complain. He ought to bear in mind that during the last thirty-five years he has been an officer of the British army, and, as such, subject to the will and pleasure of the Crown, which will retain or remove him as it thinks fit.* (emphasis added)

(vi) in accordance with the literal interpretation and purposive construction, the competent authority may exercise its discretion to discharge a serviceman from service "at any time" pursuant to reg. 61(1)(m) of the AFTSR even though:

(a) the serviceman has been previously exonerated in a summary trial or court-martial (summary trial/court-martial); or

(b) the serviceman has been found guilty and punished in the summary trial/court-martial [decision (summary trial/court-martial)] and the decision (summary trial/court-martial) is subsequently quashed by way of an order of *certiorari* by the court; and

(vii) if the court sets aside a decision of the competent authority to discharge a serviceman from service under reg. 61(1)(m) of the AFTSR, this will not only be contrary to the literal interpretation and purposive construction but will also render reg. 61(1)(m) of the AFTSR redundant.

[35] In this case, the second appellant's decision was clearly made under reg. 61(1)(m) of the AFTSR. Premised on the reasons expressed in the above para. 34, notwithstanding the quashing of the first appellant's decision by the High Court (due to the first appellant's procedural impropriety), the second appellant's decision could still be lawfully made under reg. 61(1)(m) of the AFTSR. In other words, once the learned HCJ had set aside the first appellant's decision, the High Court could not set aside the second appellant's decision as a matter of course.

[36] Regrettably, the learned HCJ had issued a *certiorari* order to quash the second appellant's decision without any consideration of the literal interpretation and purposive construction. In fact, the GOJ did not even refer to reg. 61(1)(m) of the AFTSR. Such an omission, in our view, amounts to a legal error on the part of the learned HCJ which warrants appellate intervention by this court.

[37] There is a second reason to uphold the validity of the second appellant's decision. The statement did not allude to any ground to impugn the second appellant's decision. Worse still, no reference was made in the statement to reg. 61(1)(m) of the AFTSR. In this regard, we reproduce below O. 53 rr. 3(2) and 7(1) of the RC:

> O. 53 r. 3(2) *An application for leave* must be made ex parte to a Judge in Chambers and *must be supported by a statement setting out* the name and description of the applicant, *the relief sought and the grounds on which it is sought*, and by affidavits verifying the facts relied on.
>
> O. 53 r. 7(1) *The Judge may allow the statement to be amended*, and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the application, *and where the applicant intends to amend his statement* or use further affidavits, *he must immediately give notice of his intention and of any proposed amendment of his statement to every other party*. (emphasis added)

By virtue of O. 53 r. 3(2) of the RC, the respondent is bound by the statement (which did not state any ground to invalidate the second appellant's decision, let alone refer to reg. 61(1)(m) of the AFTSR). Furthermore, the respondent did not apply to court pursuant to O. 53 r. 7(1) of the RC to amend the statement so as to include any ground to impugn the second appellant's decision. In this regard, we rely on the following judgment of the Court of Appeal delivered by Ahmadi Asnawi JCA in *DKLS Sunshine Sdn Bhd v. Kerajaan Negeri Pulau Pinang & Anor* [2019] 3 CLJ 593, at [48]:

> [48] *Further, under O. 53 r. 3(2), an application for leave for judicial review* must be made *ex parte* and *must be supported by a statement setting out* the name and description of the applicant, *the relief sought and the grounds in which it is sought and by affidavits verifying the facts relied on. This order is mandatory. It further emphasises the principle that a party is bound by his own pleading and this rule is also mandatory in nature* … (emphasis added)

[38] Lastly, in view of the object of reg. 61(1)(m) of the AFTSR (please refer to the above sub-para. 34(5)), the learned HCJ should have declined to exercise his discretion to issue an order of *certiorari* to quash the second appellant's decision.

Should Respondent Be Court-Martialled?

[39] As explained in the above para. 19, the first appellant had not breached s. 97(9) of the AFA by not giving the respondent a right to elect to be tried by court-martial. As such, there was no lawful basis for the learned HCJ to issue a *mandamus* order for the respondent to be court-martialled.

[40] In any event, due to the application of reg. 61(1)(m) of the AFTSR which justified the second appellant's decision (please refer to the above paras. 34 to 36), namely, the respondent had been lawfully discharged from service by the second appellant's decision, an order of *mandamus* to direct the respondent accused to be re-tried by court-martial is an exercise in futility.

Costs

[41] The Court of Appeal has a discretion under r. 54 of the Rules of the Court of Appeal 1994 to award costs for an appeal. We have decided that no costs for this appeal should be awarded because firstly, the appellants have only succeeded in part. Furthermore, this appeal raises novel questions of law (as outlined in the above para. 2).

Conclusion

[42] Premised on the above evidence and reasons, we allow this appeal in part as follows:

(i) part of the High Court's decision (to quash the first appellant's decision by way of *certiorari* with no order of costs for the JRA) is affirmed;

(ii) part of the High Court's decision which had issued:

  (a) a *certiorari* order to quash the second appellant's decision; and

  (b) an order of *mandamus* for the respondent to be re-tried by court-martial;

  is set aside; and

(iii) there will be no order as to costs for this appeal.